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MAHAMEDI PARADICE KREISMAN LLP (NLMI)
550 SOUTH WINCHESTER BLVD.
SUITE 605
SAN JOSE CA 95128

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OFFICE OF PETITIONS

In re Patent No. 7,685,039

Issued: March 23, 2010

Application No. 10/810,176

Filed: March 26, 2004

Attorney Docket No. NLMI.P126

: LETTER REGARDING

: PATENT TERM ADJUSTMENT

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This is a decision on the "PETITION FOR PATENT TERM ADJUSTMENT UNDER 37 CFR § 1.705(d)" filed on April 16, 2010, requesting that the patent term adjustment indicated on the above-identified patent be corrected from 1708 days to 2563 days.

The request for review of the patent term adjustment is **DISMISSED**.

Patentees are given **THIRTY (30) DAYS or ONE (1) MONTH, whichever is longer**, from the mail date of this decision to respond. No extensions of time will be granted under § 1.136.

The patent term adjustment indicated in the patent is properly reflected.

The period of examination delay, "A" delay", pursuant to 37 CFR 1.702(a)(1) and 37 CFR 1.702(a)(2) is 1470+17 days. The "B" delay period, the over three year period begins on March 26, 2007 and ends on March 23, 2010, the day the patent was issued. However, two periods of overlap begin on March 26, 2007 to June 4, 2009 and December 12, 2009 to December 29, 2009, thus the period of overlap is 801+17 days, and therefore, considering the 818 days of overlap, the "B" delay is 1093 days. However, Applicants argue that the total applicant delay is 0 days and not 54 days as determined by the Office.

Applicants argue that for the time period, June 29, 2009 to January 29, 2010, applicant caused no delays in the prosecution of this application pursuant to 37 CFR § 1.704. Applicant's arguments have been considered, but not found to be persuasive.

The reduction of 54 days has been considered and found to be warranted. It is undisputed that drawings were filed January 29, 2010, after the mailing of the Notice of Allowance. This was a proper basis for reduction of patent term adjustment pursuant to § 1.704(c)(10).

37 CFR § 1.704(c)(10) provides that:

Submission of an amendment under § 1.312 or other paper after a notice of allowance has been given or mailed, in which case the period of adjustment set

forth in § 1.703 shall be reduced by the lesser of:

- (i) The number of days, if any, beginning on the date the amendment under § 1.312 or other paper was filed and ending on the mailing date of the Office action or notice in response to the amendment under § 1.312 or such other paper;
 - or
- (ii) Four months;

As stated in M.P.E. P. 2732

37 CFR 1.703 specifies the period of adjustment if a patent is entitled to patent term adjustment under 35 U.S.C. 154(b)(1) and 37 CFR 1.702. When a period is indicated (in 37 CFR 1.703 or 1.704) as "beginning" on a particular day, that day is included in the period, in that such day is "day one" of the period and not "day zero." For example, a period beginning on April 1 and ending on April 10 is ten (and not nine) days in length. 35 U.S.C. 154(b)(1)(A) and (B) provide for an adjustment of one day for each day after the end of the period set forth in 35 U.S.C. 154(b)(1)(A)(i), (ii), (iii), (iv), and (B) until the prescribed action is taken, whereas 35 U.S.C. 154(b)(1)(C) provides for an adjustment of one day for each day of the pendency of the proceeding, order, or review prescribed in 35 U.S.C. 154(b)(1)(C)(i) through (iii). Therefore, the end of the period set forth in 37 CFR 1.703(a) and 1.703(b) (which correspond to 35 U.S.C. 154(b)(1)(A) and (B)) is "day zero" (not "day one") as to the period of adjustment, whereas the first day of the proceeding, order, or review set forth in 37 CFR 1.703(c), 1.703(d), and 1.703(e) (which correspond to 35 U.S.C. 154(b)(1)(C)(i) through (iii)) is "day one" of the period of adjustment.

The filing of drawings after the mailing of the Notice of Allowance is clearly stated as a failure to engage.

As such, the total patent term adjustment is one thousand seven hundred eight days (1487 "A delay" days plus 1093 "B delay" days minus 818 overlap days minus 54 Applicant Delay days).

The Office acknowledges the submission of the required fee a set forth in 37 CFR 1.18(e).

Telephone inquiries specific to this decision should be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions